

IN THE

United States 8

Circuit Court of Appeals

For the Ninth Circuit.

J. P. ROSE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Filed

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Clerk.

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

J. P. ROSE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief on Behalf of Plaintiff in Error.

STATEMENT OF THE CASE.

This case is a mere echo of the case of W. H. Wooldridge, Plaintiff in Error, vs. The United States of America, Defendant in Error, now pending in this court.

On the evening of February 15, 1916, Mr. Rose, the plaintiff in error, was sitting in the living-room at the rear of his repair-shop, on Lacey Street, in the town of Fairbanks, talking with said W. H. Wooldridge. Deputy marshals had placed themselves in a hallway adjoining this room so that they could, through an opening cut in the sheeting on the partition, see the two men as they sat talking and could hear part, at least, of their conversation. Presently a half-breed Indian girl, by the name of Laura Herrington, came in at the front door of the shop and passed on through to the living-room, and some ordinary conversation was had between the two men and the girl. At this juncture several deputy marshals appeared on the scene and especially at the front door of the shop.

Rose and Wooldridge were invited to go to the

marshal's office in the courthouse, which they did. Mr. Rose was taken to the marshal's office, and with five deputy marshals present was asked to make a statement of the conversation between himself and Wooldridge on that evening at his shop, and of what transpired on that occasion, which he then and there voluntarily did. His statement was taken down in writing by Chief Deputy Marshal J. H. Miller, but not having his spectacles with him, he was unable to read it, so Frank Hall, one of the deputies, and also a notary public, read the statement and swore him to it after he had signed it.

On February 17th the grand jury had under consideration an indictment against W. H. Wooldridge for statutory rape, charged to have been committed in December, 1914, and an attempt to commit the crime of statutory rape on the girl, Laura Herrington, at Mr. Rose's shop on the evening of February 15, 1916, during which Mr. Rose was examined as a witness for the Government, but his evidence was quite different from said written statement on the subject of the conversation and occurrences at his shop on that evening, he claiming that the statement was not accurate and could not have been read correctly to him by Frank Hall.

Wooldridge was indicted February 19, 1916, on two counts, the first for statutory rape in December, 1914, and the second for an attempt to commit the same crime at Rose's shop on February 15th, 1916, as against the person of said Laura Herrington.

March 2, 1916, the indictment against Rose was returned by the grand jury and was marked "Secret,

Without Bail." No warrant of arrest was issued till March 27, 1916, on which date he was arrested, placed in the jail, and has remained there and in the penitentiary at McNiel's Island since.

The trial of Wooldridge commenced on the 5th or 6th of March, 1916, and while the secret indictment was on file, but before a warrant had been issued thereon and on March 9, 1916, Mr. Rose was called to the stand as a witness for the Government, and testified substantially as he had before the grand jury, the District Attorney confronting him with the said written statement as he had done before the grand jury. Rose proved to be a very disappointing witness for the prosecution, his evidence being in material conflict with said "statement." Accordingly, on March 27, 1916, a warrant was issued on the secret indictment in his case, and it was then ascertained to be a charge of having, on June 1, 1913, committed the offense of statutory rape upon a half-breed Indian girl by the name of Grace Carey.

A demurrer to the indictment for insufficiency within Chapter 7, Title 15, Alaska Code, and because it did not state facts sufficient to constitute a crime, was interposed by the plaintiff in error, and overruled, after which he plead not guilty, and his trial took place in April of this year, and on April 12, 1916, he was sentenced to imprisonment at McNiel's Island for a period of eight years.

At the trial the only witness against Mr. Rose was the prosecutrix, Grace Carey, a girl of fifteen years of age. She testified to an act of sexual in-

tercourse between herself and J. P. Rose, defendant below, very near to the Fourth of July, 1913, and another similar act a week or two before that. The Government produced no other witnesses directly or indirectly corroborating Grace Carey. The defendant as a witness in his own behalf, denied having had sexual intercourse with Grace Carey at the times and place mentioned by her or at any other time or place.

To show that the prosecution was not in good faith, and that defendant was not on trial for the reason that he had committed a crime, but rather because he had offended the District Attorney in the matter of giving evidence in the Wooldridge case, Mr. Rose was asked in chief whether he had been a witness for the Government before the grand jury and at the trial of Wooldridge in the District Court on March 9, 1916, and as to whether the District Attorney became angry at him by reason of the evidence he gave, to which he answered in the affirmative, and also testified that at the time he testified on March 9, 1916, he had been informed and believed that there was on file a secret indictment charging him with the same crime as Wooldridge had been indicted for; but Mr. Rose was not asked, nor did he testify in chief, anything concerning the nature of the charge against Wooldridge nor the evidence he had given in that case. He also gave evidence in chief that prior to his trial the District Attorney had sworn to a complaint before a magistrate, charging him with perjury in the Wooldridge case, upon which he had been bound

over to the grand jury, but, of course, said nothing about the particulars of the charge and nothing about the basis of it.

These questions propounded to defendant below and his answers thereto were made the pretext to cross-examine him at length as to the said "statement" signed by him February 15, 1916, which was taken from the files in the Wooldridge case, and one sentence, and only one, viz., "Wooldridge asked me about Laura while I was lying on the bed and said he wanted to — her, or words that gave me to understand that he wanted to have sexual intercourse with her," was quoted and read to him therefrom (Plffs. Ex. 1 in Wooldridge's case), and also long extracts from his evidence at the trial of Wooldridge delivered by him March 9, 1916, were read, and he was compelled by the Court, over objection that it was not cross-examination, to admit signing the statement and having given the evidence in the District Court, but before resting defendant made the record in this case show all the facts above detailed in regard to the time of the return of the "secret indictment," the date of service of the writ of arrest, etc. (See Tr., pp. 104, 3.) *Record p 99*

In rebuttal the Government, over defendant's objections was allowed by the Court to show by two deputy marshals, viz., J. H. Miller and Frank Hall, all the details in reference to the signing of said "statement" by Rose at the marshal's office on the evening of February 15, 1916, and in doing that to display the statement itself (Plffs. Ex. 1 in the Wooldridge case), and refer to *one sentence only*,

the one above quoted, both of said witnesses swearing that Mr. Rose gave the statement voluntarily, that it was read over to him by Frank Hall in its entirety, and that he thoroughly understood every part thereof, including the sentence above quoted before signing and swearing to it. (See Tr., pp. 120 to 129.)
Record P.P. 115-127

By this time the defendant below was convicted of perjury with no opportunity to defend against it, for giving false evidence in the Wooldridge case, and, of course, his denials of the evidence of Grace Carey became worthless, and for that reason and no other, a verdict of guilty was returned against him by the jury.

*In the District Court for the Territory of Alaska,
 Fourth Judicial Division.*

No. 722—Cr.

THE UNITED STATES OF AMERICA,
 Plaintiff,

vs.

J. P. ROSE,
 Defendant.

ASSIGNMENT OF ERRORS.

The defendant below and plaintiff in error will rely for a reversal of the judgment and sentence herein on the following errors committed by the Court during the progress of the trial, to wit (See Tr., p. 152):

I.

The Court erred in overruling the demurrer to the

indictment herein, charging him with statutory rape, interposed by the defendant before his plea.

II.

The Court erred in sustaining objections to and in refusing to permit answers to be made by Grace Carey, the prosecutrix, to question asked her by defendant's attorney in cross-examination, the object and purpose of which was to show that in the summer of 1915, on the occasion of her making a trip by river steamers from Fairbanks to Dikeman and return, she had had indiscriminate sexual intercourse with the cooks, waiters, cabin-boys, some of the officers, and others aboard the steamer "Washburn" on the trip from Holy Cross, Alaska, to Dikeman and from the latter point back to Tanana or Fort Gibbon, and also with the soldiers at Fort Gibbon.

III.

The Court erred in allowing the District Attorney to propound questions in cross-examination to defendant while on the stand as a witness in his own behalf, and in requiring defendant to answer such questions over his objections, to the effect and in substance that he, defendant, on the evening of February 15, 1916, at his shop on Lacey Street, Fairbanks, had heard a conversation with one W. H. Wooldridge, and that later in the evening of the same day defendant made a statement concerning such conversation at the marshal's office in Fairbanks, in the presence of J. H. Miller, Chief Deputy Marshal, and four other deputies, which statement was taken down in writing by said J. H. Miller, and

sworn to before Frank Hall, one of said deputies present, and that said statement contained one clause in the language following: "Wooldridge asked me about Laura while I was lying on the bed, and said he wanted to screw her, or words that gave me to understand that he wanted to have sexual intercourse with her." That defendant was then interrogated as to his testimony as a witness for the Government, delivered March 9, 1916, in the case of United States of America vs. W. H. Wooldridge, on a charge of statutory rape and attempt as against the person of one Laura Herrington, and long extracts from his said testimony were read to him, all of which he was compelled to admit he had given at said trial, which conflicted with and modified the extract from said statement signed on February 15, 1916.

IV.

The Court erred in allowing the Government to call as witnesses in rebuttal said J. H. Miller and Frank Hall, and in permitting them to testify over his objections to the circumstances under which said statement of February 15, 1916, was prepared, all the details thereof and defendant's knowledge of its contents, the said statement being properly identified and shown to the said witnesses and examined by them while giving their evidence, such testimony, when compared with said statement and defendant's sworn evidence as a witness for the Government in the Wooldridge case, showing a *prima facie* case of perjury against him.

V.

The Court erred in sustaining the objections of

the District Attorney to and refusing an answer to the question propounded by defendant's attorney to J. J. Patton, a witness for defendant, as follows:

“Q. Do you know what her [refers to Grace Carey] general moral character is as made up from general reputation on that subject?”

VI.

The Court erred in giving and reading to the jury that part of its charge numbered 17, in the following language:

“17.

“You are further instructed that it is the policy of our law, as expressed in the statute, that any female under the age of sixteen years shall be incapable of consenting to the act of sexual intercourse, and that anyone committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtained her consent thereto; and whether the girl in fact consented or resisted is immaterial in this case. In this case neither the element of force nor question of consent has any application. The witness Grace Carey could not consent, and the law resists for her.”

VII.

The Court erred in overruling defendant's motion for a new trial.

VIII.

The Court erred in pronouncing sentence against him and adjudging that he be punished by imprisonment in the penitentiary at McNiel's Island, State

of Washington, for a period of eight years.

LOUIS K. PRATT,

Attorney for Defendant Below and Plaintiff in
Error.

ARGUMENT.

I.

The first assignment of error is for overruling the demurrer to the indictment. A discussion of this assignment involves several sections of our Criminal Code and Code of Criminal Procedure, among others, section 1894, 1895 and 2009, Alaska Code (1913). The two first sections were borrowed from the Ohio Criminal Code, and section 2009 from 24 U. S. Stats. at Large, p. 636, sec. 4. (See, also, for corresponding sections, Carter's Code, secs. 14 and 15, p. 4, and sec. 129, p. 27.) These sections read as follows:

Sec. 1894. That whoever has carnal knowledge of a female person forcibly and against her will, or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.

Sec. 1895. That a person convicted of rape upon his daughter, or sister, or a female person under twelve years of age, shall be imprisoned in the penitentiary during life; and a person convicted of rape upon any other female person shall be imprisoned in the penitentiary not more than twenty years nor less than three years.

Sec. 2009. That if any person related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with such other so related person, knowing her or him to be within said degree, of relationship, the person so offending shall be deemed guilty of incest, and on conviction thereof shall be punished by imprisonment in the penitentiary not less than three years and not more than fifteen years.

Our Code on the subject of criminal pleading was taken from the act of the Oregon legislature passed Oct. 19, 1864, at a time when there was no such a crime in that state as "statutory rape," and probably not in any of the other states, from which it follows that the form of indictment for rape found therein is inapplicable to the crime of "statutory rape," so called, the definition of which was taken from the Ohio Code. (See Chap. 7, p. 704, Alaska Code 1913, and especially secs. 2147, 2149a, 2150, 2157 and 2158. Corresponding secs., Carter's Code, chap. 7, p. 5, and Appendix, p. 128.) The indictment in this case follows the old Oregon form, now appearing on p. 707, Alaska Code (1913). Secs. 6816 and 6817, Ohio Criminal Code (secs. 1894 and 1895, Alaska Code 1913), define and fix the punishment for two distinct, substantive crimes, the one forcible ravishment and the other fornication, misnamed therein "rape," and the Ohio Supreme Court has so held. At common law, and under statutory

definitions following it (as our sec. 1894 does), to constitute rape, the act must have been done against the consent of the female, that is by force, either actual or constructive, but it was always realized that girls of tender age were incapable of yielding an intelligent consent, so that at common law it was conclusively presumed that a girl under ten years of age was incapable of consenting, and by statute different ages are adopted for the one to which the presumption should become effective; for example, by ours the age of twelve years. By the common law, where the girl was under ten years of age, and under our Code under twelve, the act of the boy or man is looked upon as so corrupt and fraudulent as to deprive him rightfully of the defense that the female consented, and by calling his conduct "constructive force," aided by the presumption referred to, the crime of forcible ravishment is made out.

The other substantive offense defined and punished by said sections is usually referred to in the decisions and by text-writers as "statutory rape," but in reality is *fornication*, and to avoid confusion, should have been placed in a section by itself and called "Fornication," "Unlawful sexual intercourse," or by some other appropriate name. (State vs. White (Ks.), 25 Pac. 33.)

Read literally, said sections 1894 and 1895 mean that in all cases of forcible ravishment, the punishment shall be imprisonment for life, if the female is less than twelve years old, or the daughter or sister of the defendant, and imprisonment in the penitentiary for a period ranging from three to twenty

years in all other instances. And for "statutory rape" (where the intercourse must be by consent), the punishment is imprisonment for life if the female is under twelve years of age or over twelve and under sixteen ^{or} and the daughter or sister of the defendant, and imprisonment in the penitentiary from three to twenty years where the carnal knowledge was with a girl other than a daughter or sister, who was at the time over twelve and under sixteen years of age. But this result as to punishment for "statutory rape" in imposing a life sentence is unreasonable, and, if possible, should not be imputed to the lawmakers, and moreover conflicts with section 2009, defining "incest," because the act of the boy or man having sexual knowledge of his daughter or sister, with her consent, at a time when she was over twelve and under sixteen years of age, would be *incest* under that section, punishable by imprisonment for a period of three to fifteen years.

To harmonize and reconcile sections 1894, 1895 and 2009, so that the Court, counsel, jury, defendant and spectators may know what is really taking place, I maintain that they should be construed to mean that the first offense defined by section 1894 covers all instances of forcible ravishment, without reference to the age of the male or female, but if the girl be under the age of twelve years, her nonconsent is conclusively presumed; that the second crime defined thereby includes all cases where the male is over the age of sixteen years and the female is over twelve and under sixteen years of age and consents to the act, that is, gives an *intelligent consent* which the law itself assumes, and is not the daughter or

- sister of the defendant; acts of sexual intercourse by consent, between father and daughter or sister, or between brother and sister, are incest under section 2009, where the girl or woman is over twelve years old.

From this it logically follows that when section 1894, in the last clause, denounces as a crime the act of a boy or man over sixteen years of age, having carnal intercourse with a girl under that age, with her consent, it had in contemplation the protection of girls possessing sufficient knowledge to give an *intelligent consent*. The two sections assume, or rather arbitrarily presume, that a girl over twelve and under sixteen years of age, if she submits willingly to sexual embraces, does so intelligently. This being the true construction of the law, it is a matter of course that the indictment must charge the act to have been committed *with her consent* to differentiate it from forcible ravishment and incest. The indictment here fails to allege that the girl, Grace Carey, consented. (See Tr., p. —.) *Record Page 2*

From the indictment the defendant did know that the charge against him was "that he, being over sixteen years of age, had carnal knowledge of Grace Carey at a time when she was over twelve and under sixteen years old," but he had no way of telling whether the Government would introduce evidence of a forcible ravishment or a carnal intercourse by consent. If the former, then the "outcry" and "recent complaint" of the prosecutrix would have been admissible in evidence, because both are the natural concomitants of such outrages, but if the "consent" phase was to be relied on, then complaints

are unnatural, and only come, if at all, from brazen impudence in the guise of gossip and tattle, and are hence mere hearsay. The defendant had a right to be informed of the nature and extent of the crime charged, and therefore attacked the indictment by demurrer (Tr., p. 3), and insisted there, as he does here, that the charge is wholly bad in not stating that the intercourse was had with the consent of the prosecutrix.

Section 2157, Alaska Code (1913), reads: "That words used in a statute to define a crime need not be strictly pursued in the indictment, but other words conveying the same meaning may be used." The indictment in Rose's case omits entirely the words of the statute, "with her consent," and makes no reference thereto in any form of language. Usually, no doubt, a charge in the language of the statute is sufficient, but I submit that in order to avoid confusion and conflict as between said sections 1894, 1895 and 2009, an indictment for "statutory rape," to be direct and certain, must allege in substance, "that the defendant, being a male person over the age of sixteen years, had carnal intercourse with the prosecutrix with her consent, she at the time being a female person over twelve and under sixteen years of age, and not his daughter or sister."

State vs. Carl, 71 Ohio St. 259, 266; S. C. 73 N. E. 463

State vs. Hensley, 75 Ohio St. 255, 267. 79 NE 462

Hubert vs. State (Neb.), 104 N. W. 276.

State vs. Lee Yan Yan, 10 Pac. 365.

State vs. Daly (Ore.), 18 Pac. 357.

15 Ency of Forms No 17043
Bishop on Stat Crimes, Sec 426.

State vs. Birchard (Ore.), 59 Pac. 468, 471.

State vs. Hoskinsen (Ks.), 96 Pac. 138.

People vs. Wilmot (Cal.), 72 Pac. 838.

State vs. Griffin (Wash.), 86 Pac. 951, 954.

There is another permissible argument that can be advanced in favor of the demurrer to the indictment. Chapter 7, page 673, Alaska Criminal Code (1913), defines and specifies the punishment for all sexual offenses affecting "Morality and decency," except "Fornication," among which are adultery, unlawful cohabitation in a state of adultery or fornication, polygamy, seduction and incest.

In 1909, Congress, by section 318, Chapter 13, U. S. Criminal Code, defined the offense of "Fornication" in this language, to wit:

"If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months." This section is a part of the United States Penal Code, and is made especially applicable by the act itself to the Territories, of which Alaska was and is one. The act of sexual intercourse by consent with a girl over twelve and under sixteen years of age is fornication, and calling it "rape" does not make it that crime, so it may fairly be argued that section 318 of the United States Penal Code takes the place of the last clause of section 1894, defining "statutory rape," supersedes it and by repugnancy effects its repeal. If this was declared to be the condition of the law, then Alaska, by Chapter 7, page 673, Alaska Code (1913), with said section 318, would have as complete a code of law on the subject of sexual offenses as could be

found in the codes of any of the States, and at the same time it would be tangible and just. Under it carnal knowledge of a girl over twelve and under sixteen would ordinarily be either adultery or fornication, but of course might in this instance be incest.

1st Wigmore on Ev., sec. 402 (3).

State vs. White (Ks.), 25 Pac. 33.

II.

The second assignment of error complains of the ruling of the Court in sustaining objections made to questions asked the prosecutrix, Grace Carey, on cross-examination, to show her lascivious conduct while a passenger, in the summer of 1915, on the river steamer "Washburn" from Holy Cross to Dikeman, and from that point to Fort Gibbon. The questions went to the moral character of the witness, and were clearly admissible to affect her credibility. (See Tr., pp. 45-57.) *Record P. 40-70*

The fifth assignment of error is based on the same reason and authority, and will be submitted with the second. (See Tr., p. 104.) *Record P. 100.*

Sec. 1501, Alaska Code (1913).

Leverick vs. Frank, 6 Ore. 212.

State vs. Bacon (Ore.), 9 Pac. 393.

State vs. Welch (Ore.), 68 Pac. 808.

Riedsecker vs. Wade (Ore.), 138 Pac. 485,
486.

Gerlinger vs. Frank (Ore.), 145 Pac. 1069.

People vs. Fong-Ching (Cal.), 91 Pac. 105.

State vs. Apley (N. Dak.), 48 L. R. A. (N. S.)
269, 283.

2d Wigmore, sec. 1610.

3d Wigmore, sec. 1983.

III.

The third assignment predicates reversible error upon the action of the Court in overruling the objections to questions asked the defendant below by the District Attorney on cross-examination.

Mr. Rose had been asked on the direct about giving evidence as a witness for the Government before the grand jury on February 17, 1916, and before a trial jury in the District Court on March 9, 1916, in the case of United States vs. W. H. Wooldridge, and as to the fact of the dissatisfaction with him on the part of Mr. Roth, the District Attorney, on account of his testimony in that case, but he was asked nothing and said nothing about the nature of the charge against Wooldridge, nor as to what evidence he had given, nor as to the statements made by him that were the basis of the charge of perjury preferred by the District Attorney. On his cross-examination the Court allowed the District Attorney, over the objection that it was not proper cross-examination, to go back to Rose's statement made on the evening of February 15, 1916, at the marshal's office, and single out and read to him one sentence therefrom (the one quoted above), and then read long extracts from his evidence on the same subject at the trial of Wooldridge on March 9, 1916, and interrogated him at length in regard to such statement and evidence.

I claim that such a course of questioning was clearly outside the scope of a legitimate cross-examination of the matters brought out in his direct examination, and that it was very damaging to the defendant below, notwithstanding his version on

cross-examination of the conversation at his shop, the making of the statement, etc., was substantially the same as told before in the grand jury room and at the Wooldridge trial. Our Code (1913), by section 1498, fixes the general rule as to the limits of a cross-examination, and by section 2258 another and different one is prescribed in the instance of a defendant on the stand in a criminal case giving evidence in his own behalf. In the latter situation the cross-examination is much circumscribed as compared with the scope of the cross-examination under said section 1498. Our section 2258 is a copy of section 1365, Hill's Annotated Laws of Oregon, with the last sentence or part of a sentence omitted, that is, the language in the Oregon Code, "upon all facts to which he has testified, tending to his conviction or acquittal," was not retained by the codifiers of the Alaska Code. But that this omission makes no change in the construction and meaning of our section 2258, seems self-evident. The Supreme Court of Oregon, in *State vs. Saunders*, 12 Pac., page 445, expressed the opinion that on general principles of criminal evidence, a defendant, when on the stand as a witness, could not be asked on cross-examination as to whether he had been charged with the commission of or had committed some crime different from the one upon which he was being tried, at some other time and place, and that certainly under the Oregon Code he could not be so interrogated. The Supreme Court of the United States, in *Fitzpatrick vs. United States*, seems to hold that our section 2258 means and should be applied the same as the Oregon Supreme Court construed section 1365 of Hill's Annotated

Oregon Code, and both courts cite the same Oregon cases as authority for their views. Even under section 1498, Alaska Code (1913), it would not have been permissible for the District Attorney to go into the distinct and collateral matters of the "statement" in the marshal's office and Rose's evidence in the Wooldridge case. But having done so, the Government was bound by his answers, and evidence in rebuttal was highly improper and prejudicial. (Tr., pp. 91 to 98.) *Review 1283-99.*

8th Pleading & Prac., pp. 102, 103, 104, 127.

1st Wigmore, sec. 194.

State vs. Lurch (Ore.), 6 Pac. 408, 410.

State vs. Saunders (Ore.), 12 Pac. 441, 445.

State vs. Olds (Ore.), 22 Pac. 940.

State vs. Gray (Ore.), 79 Pac. 53.

State vs. Jensen (Ore.), 140 Pac. 740.

State vs. Trego (Idaho), 138 Pac. 1124.

Fitzpatrick vs. United States, 178 U. S. 305;
S. C., 44th Law Ed. 1078, 1083.

Goltra vs. Penland (Ore.), 77 Pac. 129.

Simmons vs. O. R. & N. Ry. Co. (Ore.), 69
Pac. 1022.

Schreyer vs. Turner Flouring Mills Co.
(Ore.), 43 Pac. 719, 723, col. 2.

IV.

The fourth assignment is for the error in permitting the Government to dispute the testimony of the defendant below, given by him on cross-examination on the subject of the "statement," and his evidence in the District Court in Wooldridge's case, by calling Chief Deputy Marshal J. H. Miller and

Deputy Frank Hall, as witnesses in rebuttal. It may be that the defendant's evidence in the cross-examination would not have injured him materially, if left as he delivered it, because it was consistent and reasonable, but when those two witnesses were allowed to testify as to all the details of the signing of the "statement" in the marshal's office, Rose was utterly discredited, and made to appear as a perjurer, with no opportunity to right himself on that charge. He was then dumb before his accusers and at the mercy of an abandoned girl. The questions and answers on cross-examination were collateral to his evidence in chief, and the Government was estopped to deny their truthfulness, and the error of the Court in overruling his objections to the testimony of Miller and Hall was glaring, and resulted in a verdict of guilty, not of rape but for perjury. Alaska is indeed a "Wonderland" in more ways than one. (Tr., pp. 91 to 98.) *Review pp 115-124.*

Fenstermaker vs. Tribune Pub. Co. (Utah),
43 Pac. 112, 117.

3d Wigmore, secs. 1863, 1904.

V.

The sixth assignment is for giving the seventeenth instruction, section 1894, Alaska Code (1913), makes it a crime for a boy or man over the age of sixteen to have sexual intercourse with a girl under that age, by the consent of the girl. This instruction turns the whole section around, and tells the jury that consent or nonconsent has nothing to do with the case from any point of view, and that under it the girl would be incapable of consenting if she wanted to. The effect of this instruction on the jury

could only be, and doubtless was, to arouse feelings of amazement mingled with doubt, culminating in a confused idea of what they were there for and what it was they were trying to do, anyhow.

VI.

The seventh assignment is for denying the motion for a new trial. It was well taken, and should have been sustained by the trial court and its numerous errors corrected here.

The eighth assignment complains of the judgment and sentence. It was indeed hard that an old man, fifty-nine years of age, should have to go to a penitentiary for a period of eight years, practically for the remainder of his life, on the uncorroborated testimony of a young Indian girl, who by her own evidence was and is vicious and dissolute, and that against his positive denials.

VII.

It may be claimed that the defendant's counsel failed to say "excepted to by defendant" after some of the adverse rulings on the reception or rejection of evidence. The record does show exceptions to the more important rulings, but in some instances, merely the objection, the statement of the grounds therefor, and the adverse ruling appear.

Section 1052, Alaska Code (1913), gives a definition of an exception as follows: "An exception is an objection taken at the trial, to a decision, * * * on the admission of evidence, etc." In reason, when an objection to the admission or rejection of evidence is taken, with the grounds of such objection stated, followed by a ruling of the trial court on such objection, a complete record, fair to the trial court

and intelligent to a reviewing court, is made. It would then show that the lower court's attention was directly called to the ground of the objection, and that he had ruled advisedly on the point raised by the objection, and to say that after the ruling the attorney for the party injured must say, "I except," or anything else, seems far-fetched and meaningless. Some such thought as this must have been in the minds of the congressional committee that gathered together the matter which was enacted into a law and is known as the Alaska Code of Civil Procedure. How else can one account for section 1056, Alaska Code (1913), which reads:

Sec. 1056. The verdict of the jury, any order or decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made to its admission or rejection at the time of its offer, or made upon *ex parte* application or in the absence of a party, are deemed excepted to without the exception being taken or stated, or entered in the journal.

This section was not in the Oregon Code, and I do not know where the codifiers got it. Possibly it was partly or wholly phrased by them. It became law June 6, 1900, is general in its terms, and there is nothing in the Code of Criminal Proc. of 1899 of like import. (See Carter's Cr. C., Chap, 17, p. 72; also p. 1.) It follows that Oregon decisions on this point of practice are inapplicable, and all that is re-

quired under the Alaska practice is to make the objection, state the reasons therefor, and secure a ruling of the Court thereon, and get all this in a bill of exceptions, all of which was done in this case.

Respectfully submitted,

LOUIS K. PRATT,
Attorney for Plaintiff in Error.